in the circumstance of the case a period of 37 days is not reasonable time. Secondly, the mistake or omission on the part of the solicitors' clerk in not serving the Notice on the Respondent's solicitors earlier does not constitute material upon which I could exercise my discretion in favour of the Appellants. (*Ratnam* v. *Cumarasamy*[1]). Thirdly, counsel for the Appellants have submitted that the Appellants have good grounds of appeal both in law and in fact and they have exhibited a draft Petition of Appeal in their affidavit. Again, in my opinion the question of merit of the Appeal does not constitute 'special ground' upon which I can exercise my discretion in their favour (*Ahmad bin Yahaya* v. *Ahmad bin Sulaiman*[2]). In fact, similar issues were decided by the Federal Court in *Cheah Teong Tat* v. *Ho Gee Seng & Ors.*[3] with which I am bound.

For the above reasons this application is dismissed with costs.

Application dismissed.

Solicitors: *Darsham Singh & Co.; Tan Beng Hong & Co.*

P.M.K. RAJAH v. WORLDWIDE COMMODITIES SDN. BHD. & ORS.

[O.C.J. (Zakaria Yatim J.) July 19, 1984]

[Kuala Lumpur – Civil Suit No. C2523 of 1982]

Practice and Procedure – Anton Piller order obtained ex parte against defendants – Application for discharge of – Misrepresentation by plaintiff – Applicability of doctrine of self-incrimination in Malaysia – Discharge of Anton Piller order.

The first, second, sixth and seventh defendants sought for an order of the court to discharge an *Anton Piller* order granted on December 30, 1982. The defendants contended that (a) the plaintiff had misled the court by stating in his affidavit in support of the *ex-parte* application that the first defendant was required by law to keep a segregated bank account in respect of the plaintiff and (b) it was not possible to show the trading statements to the solicitors of the plaintiff without disclosing particulars of other clients which were confidential in nature. The production of the documents referred to in the order would incriminate the defendants by providing evidence on which they could be prosecuted for offences under the Commodities Trading Act 1980 and for conspiracy and fraud.

Held, allowing the defendant's application: (1) the plaintiff had made a false assertion in his affidavit in support of the *ex-parte* application, which led the court to grant the first part of the order. If in applying for and obtaining an *ex-parte* order the plaintiff had either misrepresented or suppressed material facts, the order would be dissolved on that ground alone;

(2) the principle laid down in *Rank's* case[3] applies in this case;

(3) the defendants were entitled to the privilege not to give discovery of documents, the disclosure of which would incriminate them.

Cases referred to:

(1) *Sari Artists Film Productions Sdn. Bhd.* v. *Malaysia Film Industries Sdn. Bhd.* [1974] 1 M.L.J. 123, 124.
(2) *Leong Wan Yin & Anor.* v. *Nestra Plantations Sdn. Bhd.* [1982] 2 M.L.J. 65, 66.
(3) *Rank Film Distributors Ltd. & Ors.* v. *Video Information Centre & Ors.* [1980] 2 All E.R. 273 (C.A.), [1981] 2 All E.R. 76, (H.L.).
(4) *Television Broadcasts Ltd. & Ors.* v. *Mandarin Video Holdings Bhd.* [1983] 2 M.L.J. 346.
(5) *M.P. Sharma* v. *Satish Chandra* [1954] S.C.R. 1077.
(6) *The State of Bombay* v. *Kathi Kalu* [1962] 3 S.C.R. 10.

CIVIL SUIT.

R.R. Chelliah for the first, second, sixth and seventh defendants.
Ravindran for the plaintiff.

Cur. Adv. Vult.

Zakaria Yatim J.: In this notice of motion, the first, second, sixth and seventh defendants are seeking for an order of the Court to discharge an *Anton Piller* order granted on December 30, 1982.

The order was made on an *ex-parte* application by the plaintiff. It stated that:-

"The 1st. Defendant whether acting by their Directors, Officers, Servants or Agents or any of them or otherwise howsoever do permit a solicitor from the firm of M/s Sham Sunder & Partners of Lot 4.1, 4th Floor, Wisma Shen, Jalan Masjid India, Kuala Lumpur one other employee of the Plaintiff's said Solicitors and such other persons not exceeding three in number as may be duly authorized by the Plaintiff together with the Bailiff of this Court to enter and remain upon the premises of the 1st. Defendant's at Hong Kong and Shanghai Bank Building, 11th Floor, No. 2, Leboh Ampang, Kuala Lumpur at any hour between 8.00 o'clock in the forenoon and 6.00 o'clock in the evening for the purpose:-

(a) of taking into possession and removal therefrom into the possession and custody of the plaintiff's said Solicitor

for preservation pending trial the segregated accounts pertaining to the Plaintiff's account No. 9277 held with the 1st. Defendant.

(b) of inspecting and making photostat copies of the Register of Trading Statements of the 1st. Defendant for the period 9th September to date together with the Records of Trading in Silver by the 1st. Defendant with all or any overseas Commodity Exchange or Brokers and in particular with COMEX."

There are two main grounds for the application to discharge the order.

The first ground is that the plaintiff had misled the Court by stating in his affidavit in support of the *ex-parte* application (enclosure 2) that the first defendant was required by law to keep a segregated bank account in respect of the plaintiff. Paragraph 11 of the affidavit stated as follows:-

"I am further advised and do verily believe that the Defendants are required by law to keep Segregated Accounts with a Bank or other approved Institution of all transactions carried out by the Defendants on my behalf."

Counsel for the applicants, Mr. R.R. Chelliah submitted that the learned Judge made the Order on the basis of the statement contained in the above paragraph. He added that on the strength of that statement the order gave right to the plaintiff to inspect the accounts. According to him the above paragraph contained a false statement.

I agree with the submission made by Mr. Chelliah. Section 40 of the Commodities Trading Act, 1980 does not require a dealer to keep separate segregated accounts for different clients. The section permits a dealer to keep one segregated account in respect of all his clients. The plaintiff in a subsequent affidavit filed on September 9, 1983 (enclosure 61) admitted, in paragraph 16, that the ". . . 1st. defendant is only required to keep a segregated bank account of all its customers ..."

It is clear, therefore, that the plaintiff had made a false assertion in paragraph 11 of his affidavit in support of the *ex-parte* application, which led the court to grant the first part of the order. The law clearly states that, if, in applying for and obtaining an *ex-parte* order the plaintiff had either misrepresented or suppressed material facts, the order would be dissolved on that ground alone. *Sari Artists Film Productions Sdn. Bhd.* v. *Malaysia Film Industries Sdn. Bhd.*[1] and *Leong Wan Yin & Anor.* v. *Nestra Plantations Sdn. Berhad.*[2]

The second ground for the application is that it is not possible to show the trading statements to the solicitors of the plaintiff without disclosing particulars of other clients which are confidential in nature. According to the applicants, the production of the documents referred to in the order would incriminate the defendants by providing evidence on which they could be prosecuted for offences under the Commodities Trading Act, 1980 and for conspiracy to defraud. In his affidavit (enclosure 55) in support of the application, the second defendant stated as follows:-

"8(i) Trading relating to other customers do not form the subject matter of this action and are confidential.

(ii) Further the production of the said documents may incriminate the Defendants by providing evidence on which they could be prosecuted for offences under the Commodities Trading Act, 1980 and for conspiracy to defraud."

The plaintiff had already written a letter dated November 26, 1982 to the Commissioner of Commodity Trading accusing the first defendant of indulging in criminal activities with intent to defraud and deceive their clients and of "bucketing". Indeed, in his statement of claim, the plaintiff alleged that the first defendant was carrying on its business with intent to defraud him. He also alleged that the first defendant carried out the "malpractice of bucketing". Under the Commodities Trading Act, "bucketing" is an offence. [See sections 56 (2) and 59 (2)].

The question to be considered now is whether the applicants are entitled to the privilege not to disclose documents relating to other clients which are confidential in nature and documents which may incriminate them.

In *Rank Film Distributors Ltd. & Others* v. *Video Information Centre & Others,*[3] the English Court of Appeal held that part of the *Anton Piller* order requiring the disclosure of certain incriminating evidence was contrary to well established principle of privilege against self-incrimination and would accordingly be expunged. In that case, Bridge L.J., at pages 283 & 286 of his judgment, said,

"The novel and exceedingly difficult question to which this appeal gives rise is whether the defendant in a copyright action is entitled to claim privilege from giving discovery on the ground that by doing so he would tend to incriminate himself, and if so to what extent the probability of the defendant being entitled to such a privilege should affect the making of an *Anton Piller* order ... It

must follow, I think that the only satisfactory practice will be, when the Court invited to make an *Anton Piller* order can see from the strength of the applicant's evidence that the proposed defendant is in danger of self-incrimination, to abstain from making any order *ex-parte* requiring immediate answers to questions or disclosure of documents. The practical consequence of this view may well be that whenever the evidence in a copyright case is strong enough to justify the making of an *Anton Piller* Order it will also give rise to apprehension of self-incrimination on the part of the defendant so that the *ex-parte order* will effectively have to be limited to authorising the search for and seizure of infringing copies. This may be regrettable but seems to me inevitable."

Templeman L.J., in his judgment in that case, also said, at page 289,

". . . an order *ex-parte* or otherwise for discovery or interrogatories under threat of commital for disobedience should not be made if it is obvious that compliance with the order will involve the danger of self-incrimination . . . In my judgment the doctrine against self-incrimination entitles the defendant to concealment and silence. Effective concealment cannot be maintained once discovery has taken place. Any other conclusion would in practice make a mockery of the doctrine against self-incrimination."

The decision of the Court of Appeal in the *Rank's* case was upheld by the House of Lords. (3) The headnotes of the decision read as follows:-

"Since a charge against the respondents of conspiracy to defraud would not be a contrived, fanciful or remote possibility but an appropriate and exact description of what the respondents and the other persons involved had done, it was clear that disclosure by the respondents of the information sought would tend to expose them to such a charge, which would be a serious charge and would, if proved, attract heavy penalties. It followed that the claim of privilege against self-incrimination should be upheld."

The next question that arises is whether, in Malaysia, a person is entitled to claim the privilege against self-incrimination, as laid down in the *Rank's* case when served with an *Anton Piller* order. According to a recent decision of the High Court in Kuala Lumpur in the case of *Television Broadcasts Ltd. & Ors.* v. *Mandarin Video Holdings Sdn. Bhd.*, (4) a person is not entitled to claim such privilege. In that case, the Court held that in this country the privilege against self-incrimination had been withdrawn by section 132 of the Evidence Act, 1950.

In the *Television's* case, the learned Judge noted that in England, the law as laid down in the *Rank's* case against self-incrimination was withdrawn by section 72 of the English Supreme Court Act, 1981. At pages 355 & 357 of his judgment, the learned Judge stated his conclusion as follows:-

"That is the present state of law in England. In this country the privilege is withdrawn by Section 132 of the Evidence Act, 1950 . . . Section 132(1) has already withdrawn or removed the privilege. It follows that the privilege can no longer be 'enforced' or invoked. It is not there anymore. Also by section 132(2) first limb, there would no longer be any risk of arrest or prosecution, so the privilege is lost. There is no longer any question of 'enforcing' or invoking the privilege. It has gone."

With great respect, I do not agree with the decision of the learned Judge. Section 132 of the Evidence Act has nothing to do with the principle laid down in the *Rank's* case. The section states:-

"(1)A *witness* shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit, or in any civil or criminal proceeding, upon the ground that the answer to the question will criminate or may tend directly or indirectly to criminate him, or that it will expose, or tend directly or indirectly to expose, the witness to a penalty or forfeiture of any kind, or that it will establish or tend to establish that he owes a debt or is otherwise subject to a civil suit at the instance of the Government of Malaysia or of any state or of any other person.

(2) No answer which a *witness* shall be compelled by the court to give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by that answer.

(3) Before compelling a *witness* to answer a question the answer to which will criminate or may tend directly or indirectly to criminate him the court shall explain to the *witness* the purport of subsection (2)."

[Emphasis added].

It is clear that section 132 explicitly refers to a "witness". It was pointed out by counsel in the *Television's* case, that the word "witness" in section 132 did not apply to a party to a proceeding. The learned Judge, at page 357, ruled that ". . . that cannot be right. Although a witness may not be a party to proceedings, the converse is not true." He then defined a witness as ". . . a person who gives or 'furnishes' evidence. If a person gives or is compelled by a court order (as in this case) to give evidence then he is a witness. It does not matter if he is a party or any other person."

I do not think the definition stated the correct position of the law. First, it is not true that any person giving evidence is a witness. Under Section 139 of the Evidence Act, a "person summoned to produce a document does not become a witness

by the mere fact that he produces it . . ." and a document produced in court is regarded as evidence under the Act. Secondly, the definition was based on the *dicta* of two Indian Supreme Court decisions, namely, *M.P. Sharma* v. *Satish Chandra,*(5) and *the State of Bombay* v. *Kathi Kalu.*(6) These two cases dealt with offences under the Indian Penal Code. The main issue raised in those two cases was the question of the protection of an accused person as a witness under article 20(3) of the Indian Constitution. The two Indian decisions cannot, therefore, form the basis of a definition of the word "witness" in section 132 of the Act.

In my opinion, a witness, in the context of section 132 of the Act, is a person who testifies on oath or affirmation in a court of law or in a judicial tribunal. He is subject to examination in chief, cross-examination and re-examination. See section 138 of the Evidence Act. The examination of the witness must be done orally and in open court. See Order 38 rule 1 of the Rules of the High Court, 1980. As already stated, a person who merely produces a document in court is not a witness and he may not be cross-examined unless he is called as a witness. [Section 139].

On the other hand, when a person is served with an *Anton Piller* order, he is only required to give discovery of the relevant documents to the plaintiff's solicitors. He is not required to take an oath or affirmation before the plaintiff proceeds with the discovery of the documents. He is not subject to cross-examination or re-examination. Therefore, a person giving discovery of documents pursuant to an *Anton Piller* order does not fall within the meaning of the word "witness" in section 132 of the Evidence Act. In other words, section 132 does not apply at all to discovery in respect of an *Anton Piller* order. Thus, it is not correct to say that the doctrine against self-incrimination as laid down in the *Rank's* case had been withdrawn in this country by section 132 of the Act.

In my judgment, the principle laid down in the *Rank's* case applies in the instant case. The defendants are, therefore, entitled to the privilege not to give discovery of documents, the disclosure of which would incriminate them.

For the reasons stated above, the *Anton Piller* order granted on December 30, 1982, is now discharged. The plaintiff will pay the costs of this application to the first, second, sixth and seventh defendants.

Order accordingly.

Solicitors: *Raja Nayagam & Co.; Norila, Ravinthran & Partners.*

SAHADEVAL v. LEMBAGA PELABOHAN KELANG

[O.C.J. (Siti Norma Yaakob J.) August 27, 1984]
[Kuala Lumpur — Civil Suit No. P. 450 of 1981]

Administrative Law — Date of retirement — Computation — Reliance on date of birth in record of service — Dispute as to correctness of record — Whether plaintiff had been prematurely and unlawfully retired before age of 55 years.

Employment — Retirement age 55 years — Computation — Reliance on date of birth in record of service — Dispute as to correctness of record.

The plaintiff was born in India. On December 22, 1952 he joined the Malayan Railway as a ganger. In 1963 he opted to join the defendant. On January 15, 1975, all employees of statutory authorities were given an option to convert to a new scheme of service under the Harun Report which contains terms relating to a new revision of salary as well as introducing for the first time pension rights to employees like the plaintiff. The plaintiff who elected to be placed under this new salary scheme was accordingly employed. By exercising this option he had bound himself to be governed by the terms and conditions of Service Circular 1/75. Under this circular the defendant acted to retire the plaintiff from its service.

The defendant required the plaintiff to retire on December 31, 1979 from his service with the defendant on the ground that the plaintiff had already attained the compulsory age of retirement, i.e. 55 years, on that date. For the purpose of computing his age, the defendant had relied on the date of birth stated in the plaintiff's record of service, AB 1, to which the plaintiff had affixed his thumb print.

The plaintiff alleged that his date of birth in AB 1 had been wrongly recorded and when he affixed his thumb print, the contents of AB 1 were never explained to him and as he could not read or understand English, he did not know that his thumb print had the effect of signifying the correctness of all particulars recorded in AB 1. He claimed that his correct date of birth was June 7, 1928 and not December 31, 1924 as stated in AB 1 and as such he had been prematurely and unlawfully retired on December 31, 1979 as on that date he had not yet reached 55. As proof of this, he submitted copies of his identity card, Employees' Provident Fund Card, citizenship certificate and a statutory declaration which all state the date of his birth as June 7, 1928.

The plaintiff sent a photostat copy of what he claims to be his original birth certificate issued from India (P.4) to